This essential characteristic of a common element among the participants is missing in the case of the so-called "characters lottery" and therefore, in my judgment, it is not a lottery within the meaning of the Common Gaming Houses Ordinance. It follows that in the opinion of this Court the determination of the learned Magistrate was correct in point of law and should be affirmed.

The point concerning the adequacy or inadequacy of the evidence of the expert witness can be dealt with more shortly. The object of calling the expert witness was to prove by his evidence that most of the documentary exhibits were used for the purpose of carrying on a public lottery. In view of the conclusion which has been reached that the transaction in question was not a lottery it appears to be unnecessary in this case to consider the effect of the evidence of the expert witness.

I have not referred in greater detail to the two cases which were decided in the Federation of Malaya and which I mentioned earlier, not because of any lack of respect for the learned Judges who heard those cases, but because the question of the common element among the participants in a lottery does not appear to have been raised in those cases. The judgment in *Lim Seah Pong v. Public Prosecutor*[2], *supra,* contains, if I may say so with respect, a penetrating analysis of various aspects of a lottery, but, so far as I can see, the question of a common element was not among the matters dealt with by the learned Judge. The reason for this must be that the point was not specifically raised by counsel appearing in the case.

I cannot end this judgment without expressing my appreciation of the assistance rendered to the Court by Mr. Winslow, who appeared for the Crown, and by Mr. Rayner, who appeared as *amicus curiae.*

Case answered. Determination of the Magistrate affirmed.

MOHAMED DIN BIN ALI v. THE TRUSTEES OF THE NEGRI SEMBILAN SCHOLARSHIP FUND FOR HIGHER EDUCATION & TRAINING OF MALAYS

[A. C. J. (Smith J.) June 26, 1957]

[K. L. — Civil Appeal No. 35 of 1956]

Contract — Undisclosed principal — Estoppel by judgment — Civil Procedure Code (Cap. 7), s. 362

The appellant in this case went to the United Kingdom on a Negri Sembilan State Scholarship. In December 1952 he applied for a loan of £100 through the Director of Colonial Studies in London. This application was sent to the Federal Government, who referred it to the State Government, which in turn referred the application to the respondents who are the trustees who administer the Scholarship Fund. The respondents sanctioned the loan before payment. The appellant signed a receipt acknowledging receipt from the Negri Sembilan Government. In 1954 the State Government took action in its own name to recover the loan but this suit was withdrawn when it was discovered that the money lent was in fact the property of the respondents. Subsequently the respondents brought the action against the appellant. The Magistrate gave judgment for the respondents.

Held: (1) the respondents were undisclosed principles and as such were fully entitled to sue the appellant;

(2) the respondents were not estopped by the previous proceedings brought by the State Government from bringing the action.

CIVIL APPEAL.

Lall Singh Muker for the appellant.

P. Hall for the respondents.

Smith J. : — The facts of this case are not in dispute but the interpretation of them is. The defendant went to the United Kingdom on a State Scholarship. State scholarships for the higher training of Malays in the Negri Sembilan are financed from the scholarship fund established under the Negri Sembilan Scholarship Enactment (Enactment No. 3 of 1949). The fund is maintained by an annual and automatic appropriation from the general revenues of the State.

I am satisfied that the finding of facts as set out by the learned Magistrate in his grounds of judgment are supported by the evidence and I accept his finding.

The defendant, having been put to great expense by a serious accident to his wife, borrowed £100 in December 1952 through the Director of Colonial Studies in London. The application for the loan was sent by the Secretary of State for the Colonies to the

Federal Government, who in turn referred it to the State Government, which in turn referred the application to the plaintiffs, who are the trustees who administer the scholarship fund. The plaintiffs sanctioned the loan before payment.

In his evidence the defendant admits that he does not know where the money came from. It appears that after the trustees had approved the loan, the State Government arranged the advance through the Crown Agents in London and subsequently debited the plaintiff's account (See Ex. C at p. 35).

Accepting the defendant's contention that he was not aware who actually made the loan, the plaintiffs were undisclosed principals and as such fully entitled to sue the defendant (see *Bowstead* on Agency, 10th Edn., p. 185 — Article 91). This disposes of the defendant's argument that there was no privity of contract between himself and the plaintiffs.

The defendant has argued that the receipt which he gave for the loan (Exhibit D5) proves conclusively that the loan was made by the State Government and not by the plaintiffs. I cannot agree that it does anything of the kind. When he was paid the £100 in London the defendant gave a receipt in the following form :—

"This is to acknowledge the receipt of £100 (One hundred pounds) from the Negri Sembilan Government as a loan."

In the first place there is no evidence in that document that the State Government was anything more than a paying agent. There is no evidence that the receipt was prepared by the State Government. The undisputed evidence in this case is that the State Government advanced money as the agent of the plaintiffs.

In 1954 the State Government took action in its own name to recover the loan. This suit was withdrawn by the State Government when the State Government's solicitors discovered that the money lent was in fact the property of the plaintiffs and judgment was given to the defendant with costs. The defendant argues that the plaintiffs are bound by the decision in that suit because they had knowledge of it, the State Treasurer being *ex-officio* one of the trustees of the fund and being also the Treasurer of the fund. The suit by the State Government was withdrawn under section 362 of the Civil Procedure Code without leave being given to institute a fresh suit. This suit (No. 484 of 54) was instituted by the State as a result of requests by the Board (evidence of P.W.1 at page 15 line 14 *et seq*).

The defendant has argued that since the plaintiffs instigated the State Government to commence Suit No. 484 of 54, they must be bound by its result. A judgment *inter partes* raises an estoppel against the privies of the parties. To establish the relationship of party and privy between the State Government and the plaintiffs, the defendant must shew that the State Government and the plaintiffs have a similar interest in the property to which the estoppel related and also that the plaintiffs (the privies) derive their title from the State Government (see *Halsbury*, Vol. 15, 3rd Edn., p. 197, para. 373). I cannot see that the interest of the plaintiffs and the State Government are similar and, in any event, even if the plaintiffs are the privies of the State Government their title was acquired previously to the proceedings in Suit No. 484 of 54 (see *Halsbury op. cit.* para. 374 page 198). The principal had been disclosed to the defendant by the State Government and the State Government had no right to sue in its own name for the return of the loan (see *Bowstead op. cit.* Art. 130 p. 261). The plaintiffs might have been estopped if in Civil Suit No. 484 of 54 the State Government had stated that they were suing to recover money lent by them as agents of the plaintiffs but the agency was not disclosed in the plaint (see *Bowstead op. cit.* Art. 82 page 167). Civil Suit No. 484 of 54 was withdrawn and the merits not gone into because the State Government considered it had no right to sue.

I cannot see that there was in this case any "quasi-privity" as described in *Halsbury op. cit.* para. 377 page 199, since quasi-privity appears to arise only in cases where indemnity is involved. The conclusive argument against the defendant appears to me to be that in Civil Suit No. 484 of 54 the merits were not gone into and, as the plaintiffs argued, the defendant cannot show that the judgment relied on was obtained upon grounds which afford a defence in this action.

The appeal is dismissed with costs for respondents.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Shearn Delamore & Co.*